BEFORE THE
GEORGIA PUBLIC SERVICE COMMISSION

Sandersville Railroad Company Hancock County, Georgia **In re: Sandersville Railroad Company's Petition for Approval to Acquire Real Estate by Condemnation**	Docket No.: 45045

RESPONDENTS' APPLICATION FOR FULL COMMISSION REVIEW OF HEARING OFFICER'S INITIAL DECISION, REQUEST FOR ORAL ARGUMENT, AND MOTION FOR STAY OF ORDER

on behalf of the Property Owner Respondents

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Pursuant to O.C.G.A. § 50-13-17(a), Property Owner Respondents ("Respondents")[1] object to the Initial Decision of the Hearing Officer filed on April 1, 2024, (the "Initial Decision") and submit this Application for Full Commission Review (the "Application"). Respondents respectfully request that this Commission grant review, provide Respondents with an opportunity for oral argument in support of this Application, reverse the Initial Decision entered by the Hearing Officer in this matter, and dismiss this proceeding. If this Commission does not reverse the Initial Decision, Respondents respectfully request that, pursuant to O.C.G.A. § 50-13-19(d), this Commission stay the effective date of its order until full judicial review of any Commission decision is concluded.

This case presents novel and complex issues regarding the proper interpretation of the Takings Clauses of the U.S. and Georgia Constitutions, the interaction of Georgia's statutes regulating eminent domain and the condemnation authority of railroads, and the application of federal and state precedent dating back more than a century. Because these issues are so complex and unique, Respondents urge this Commission to review this Application in conjunction with their post-hearing brief (attached to this Application as Attachment A) and the post-hearing brief of Intervenors No Railroad in Our Community Coalition ("NROCC") (attached to this Application as Attachment B), both of which contain a thorough discussion of the facts and legal analysis.[2]

[1] Respondents are R. Donald Garrett, Sr. and Sally Garrett; Leo and Georgia Briggs; Marvin Smith, Jr. and Pat Smith; William Blaine and Helen Diane Smith; Verne Kennedy Hollis, Donna N. Garrett, Herus Ellison Garrett, and Sally G. Wells; Joel and Kathy Reed; and Thomas Ahmad Lee. *See* Post-Hr'g Br. Resp'ts 4-8 (describing Respondents and their properties).

[2] For the reasons set out in the post-hearing briefs and arguments by Respondents and NROCC, the Initial Decision is wrong on the facts and the law. This Application addresses how the Initial Decision also violates the Georgia Administrative Procedure Act. The Initial Decision's failure to comply with the Georgia Administrative Procedure Act provides an independent reason for this Commission to reverse the Initial Decision beyond the reasons set out in the post-hearing briefs.

Respondents explicitly adopt and incorporate the arguments made in those briefs as if fully set out in this Application.

STATEMENT OF THE CASE

This case concerns the efforts of a private railroad company, the Sandersville Railroad Company ("Sandersville"), to condemn Respondents' property. The railroad seeks to condemn this property so that it may build an entirely new rail line (the "Hanson Spur") ostensibly to serve a handful of private companies for Sandersville's financial benefit and the financial benefit of these companies.

Sandersville is a short line railroad company currently operating ten miles of mainline track in middle Georgia, about 25 miles from Sparta, Respondents' properties, and the proposed route for the Hanson Spur. *See* Post-Hr'g Br. Resp'ts 8 (describing Sandersville's business). Sandersville's current operation is state-chartered and regulated by the Commission and the federal Surface Transportation Board ("STB"). *Id*. Sandersville currently provides contract switching services connecting industries to the Norfolk Southern ("NS") rail system, which is a Class I[3] railroad. *Id*. Sandersville's current customers can access another Class I rail system owned by CSX Transportation ("CSXT") by interchanging between NS to CSXT. *Id*. Currently, Sandersville has no business in Sparta. *Id*.

At the hearing in this proceeding, representatives from five companies testified in support of the Hanson Spur. *See* Post-Hr'g Br. Resp'ts 12-17 (describing putative users and their testimony). They are Heidelberg Materials ("HM"), which owns and operates the Hanson Quarry;[4] Pittman Construction Company ("Pittman") (a construction asphalt maker that subleases land at

[3] As Sandersville's representative explained at the hearing, railroads are classified by revenue thresholds, and Class I railroads are "the big guys." (Tr. 67:25-68:3).

[4] HM currently moves the common construction aggregates mined at the Hanson Quarry out to local markets by truck. Post-Hr'g Br. Resp'ts 13.

the Hanson Quarry);[5] Veal Farms Transload, LLC and Revive Milling, LLC (both grain companies, represented in this proceeding by the same member-manager) (together, "Veal Farms"); and Southern Chips LLC.[6] *Id*. Veal Farms and Southern Chips are current customers of Sandersville's, shipping on existing Sandersville tracks and switching to the NS rail system. *Id*. at 15-16.

1. What Sandersville Needed to Prove to Meet Its Burden

The key facts here are not what Sandersville proved in this proceeding, but what it did not prove. Sandersville failed to provide sufficient evidence during the hearing to carry its burden here. The evidence Sandersville did produce is unsubstantiated and conclusory, and supported only by the testimony of individuals who will financially or politically benefit from this project. Sandersville did not submit internal documents relevant to this proceeding and responsive to the Subpoena to Testify and Duces Tecum issued by the Hearing Officer. Post-Hr'g Br. Resp'ts 21-22. Its failure to produce such documents is critical to this Commission's consideration as this affected not just the quantity of evidence the railroad produced (extraordinarily little), but also the quality of the evidence it produced (unsubstantiated, conclusory, and self-serving). Sandersville also did not produce any expert reports in either its affirmative case or in response to the expert reports presented by Respondents and NROCC. It did not submit any independent financial or environmental analyses of the condemnation. Several of the numbers it did produce, it subsequently modified. *Id*. at 20.

[5] Pittman currently is part owner of a liquid asphalt storage facility in Lithonia and testified that it is interested in using the Hanson Spur to set up a liquid asphalt storage facility at the Hanson Quarry, which would be wholly owned by Pittman, and provide Pittman a "hedge against [its] commitments under contract," insulating Pittman from "the whims of the market." Post-Hr'g Br. Resp'ts 14-15.

[6] Southern Chips is wholly owned by Sandersville Railroad Company, a fact completely omitted in the Initial Decision. This fact only compounds the private nature of the use here—Sandersville benefits as the railroad owner *and* as the railroad user. Thus, in two ways, this is a "bare transfer from A to B for B's benefit" (*Kelo v. City of New London*, 545 U.S. 469, 502 (2005) (O'Connor, J., dissenting)), where A is a Respondent property owner and B is Sandersville and Sandersville again.

As discussed more fully below, to meet its burden in this proceeding, Sandersville needed to prove that its proposed condemnation meets the Georgia Legislature's requirement that a railroad condemnation must be "necessary for the proper accommodation of the business of the company," (O.C.G.A. § 46-8-120(a)(4)); and that the condemnation complies with Georgia's eminent domain statutes in general (O.C.G.A. § 46-8-121 and Title 22 of the Georgia Code) and the Landowner's Bill of Rights (2006 Ga. L. Act 444 (H.B. 1313)) in particular. It also needed to show that the proposed condemnation satisfied the Public Use Clauses of the U.S. Constitution (U.S. Const. amend. V) and the Georgia Constitution (Ga. Const. art. I, § III, ¶ 1). It did not do any of this.

To meet its burden of showing that the taking here is necessary to accommodate Sandersville's business, the railroad had to show, at a minimum, that the taking will assist its existing railroad business. It did not do this, because it did not demonstrate that this is a viable project; it is difficult to understand how a project that appears destined for failure can be necessary to accommodate the railroad's business. Specifically, Sandersville did not produce substantial evidence regarding the following issues with the Hanson Spur:

- Sandersville did not conduct a feasibility study of the Hanson Spur and did not demonstrate that the spur is economically feasible.
- Sandersville did not undertake or provide surveys of potential customers, obtaining specific origins, destinations, volumes, or rates from CSXT (the Class I railroad line to which the Hanson Spur proposes to connect).
- Sandersville did not provide any specific feedback or direction it has received from CSXT, which will dictate the infrastructure, service, equipment, and rates offered on its line.

- Sandersville did not produce interchange rates with CSXT.
- Sandersville did not produce any evidence that it either does not need approval from the federal STB for the Hanson Spur or that it will obtain it if it does.
- Sandersville did not show that it can accumulate all the properties it needs for the Hanson Spur to operate.
- No putative customers provided evidence showing that they will actually use the Hanson Spur—for instance, they did not produce signed, binding contracts with Sandersville, nor did any putative customers provide traffic estimates or evidence that they have committed any traffic (by, for instance, showing the existence of binding or contingent contracts with CSXT or the ultimate purchasers of their products); nor did Sandersville or its putative customers offer any objective evidence of the demand for or competitiveness of their products in markets serviced by CSXT; and they did not provide any justification for any traffic numbers they did produce.

Regarding Sandersville's compliance with Georgia's eminent domain statutes, Sandersville had to prove that the Hanson Spur meets the statutory definition of public use. It did not do this either. It claimed that this project provides a "channel of trade," a recognized public use under Georgia law. Yet its definition of that term was so broad that it essentially negates the public use and public purpose requirements of the U.S. and Georgia Constitutions and guts the Landowner's Bill of Rights.

Similarly, to meet its burden that this proposed condemnation is for a public use or public purpose under the Georgia and United States Constitutions, Sandersville had to show that the taking here actually provides a public use or public purpose and is not "the mere pretext of a public purpose, [whose] actual purpose was to bestow a private benefit." *Kelo v. City of New London*, 545

U.S. 469, 478 (2005). To do so, it had to prove that the taking would result in benefits flowing to the public, not just a few identified private companies, or that its proposed condemnation would serve industries that are sufficiently associated with the public interest to qualify as a public purpose. Sandersville did not do this.

2. Sandersville's Evidence

Instead of producing substantial evidence on these points, Sandersville offered only the unsupported testimony of its operator and part-owner, Benjamin J. Tarbutton, III, the customers who expect to benefit from the Hanson Spur, a local political leader, and an engineering consultant hired by the railroad.

Mr. Tarbutton provided general discussions of the Hanson Spur's location, funding, and purpose. His testimony did not rely on demonstratable facts, projections, or studies, but on his own experience in operating a different short line rail line and his dealing with customers. Post-Hr'g Br. Resp'ts 27. He testified that Sandersville views the Hanson Spur as the "best way to accommodate and grow our company's business." (Tr. 1486:19-22). He also admitted that the Hanson Spur is not necessary for the proper accommodation of the railroad's current business. (Tr. 102:10-103:1). Instead, he testified that the Hanson Spur will allow Sandersville to expand its rail service offerings. (Tr. 102:10-103:1). Regarding the financial viability of the project, even though Mr. Tarbutton's experience in constructing railroad tracks is limited to lines he added to Sandersville's existing rail network—not brand-new lines like the Hanson Spur connecting with a Class I line—Mr. Tarbutton testified that "I just … know it's going to work." (Tr. 145:17-22).

The railroad's customers testified that the Hanson Spur would do things like allow them to beat their competition (Tr. 202:21-22, 204:13-21, 214:17-215:12, 269:19-20, 319:2-21), build additional facilities for their own benefit (Tr. 223:10-17, 230:5-7), reduce their costs (Tr. 1474:8-11), reach new markets (Tr. 308:24-309:24, 312:2-8), and provide at least one of them with a hedge

against market fluctuations in the cost of liquid asphalt (Tr. 374:18-24, 381:24-382:3). None of the customers have binding contracts with Sandersville or with identifiable customers to be served by them once the Hanson Spur is completed. Nor did they produce any evidence of any benefit to the public from the financial benefits they expect to receive from the Hanson Spur.

The railroad did produce the testimony of an engineering company contracted to perform land surveying, engineering design, regulatory permitting, and subconsultant coordination for the Hanson Spur. (Tr. 447:7-514:6). It did not, however, produce any independent analysis of the environmental effects of the railroad or how this new line would benefit the public.

3. Respondents' and NROCC's Evidence

Because the railroad and its putative customers did not provide sufficient documents or any substantive data or analysis, Respondents and NROCC undertook their own analysis of the proposed rail line (to the extent they were able to perform meaningful analyses given the dearth of information supplied by the railroad). Respondents submitted the testimony of Gary Hunter, a consultant with a 50-year career in railroad development, operations, and business, and extensive experience with all classes of railroads, including short line railroads. Post-Hr'g Br. Resp'ts 22-23; *see also* Doc. No. 20550, ex. 1 (Mr. Hunter's CV). He concluded that Sandersville had far underestimated its costs, failed to put forward an estimate of traffic that would produce enough to justify the railroad's capital outlay, failed to consider or demonstrate an understanding of CSXT's requirements, and wholly neglected to confront the possibility of federal involvement by the STB. Post-Hr'g Br. Resp'ts 24-26. For all these reasons, Mr. Hunter concluded that Sandersville had not demonstrated that the Hanson Spur was economically feasible. *Id*. at 26.

NROCC produced testimony from Hancock County Commissioner Randolph Clayton that the Hanson Spur would harm the elderly, retired community around Sparta, Georgia, by increasing noise levels and harming the environment around their homes. (Tr. 581:1-588:13). NROCC offered

an expert, Dr. Erica Walker from the Community Noise Lab at Brown University's School of Public Health, who measured noise levels the Hanson Spur will likely produce and concluded that the Hanson Spur would increase noise in the area to an unhealthy and harmful level. (Tr. 697:18-22). NROCC also produced an expert witness to testify to the historical use of eminent domain against Black communities and the devaluation Respondents' and Intervenors' properties would suffer by having a railroad bisect them. (Tr. 645:1-674:7).

In reply, Sandersville produced no expert witnesses, studies, analysis, internal documents, or outside sources that contradicted anything said by Respondents' and NROCC's witnesses.

APPLICATION FOR FULL COMMISSION REVIEW OF HEARING OFFICER'S INITIAL DECISION

1. Sandersville Has the Burden of Proof and Must Satisfy the Standard of Proof.

Respondents make this Application because the Initial Decision is incorrect under federal and Georgia law (as discussed in Respondents' and NROCC's post-hearing briefs), but also because it is inconsistent with the Georgia Administrative Procedure Act. This Commission should therefore reverse it.

Specifically, this Application is necessary because the Initial Decision misapplies the burden of proof. The burden of proof here is if the evidence is equal, the party with the burden loses. Contrary to this standard, the Initial Decision accepts Sandersville's unproven and unsubstantiated assertions as true and does so in the face of the substantial evidence produced by both Respondents and NROCC that the railroad's proposed condemnation benefits only private interests (and thus is not a public use), is not economically viable (and thus cannot be necessary to accommodate Sandersville's business), and is not in the public interest and would harm the public (and thus would not serve a legitimate public purpose).

Because Sandersville is asserting facts, the proof of which is essential to its proposed condemnation, Sandersville bears the burden here. *See Lazenby v. Citizens' Bank*, 20 Ga. App. 53, 53, 92 S.E. 391, 392 (1917) ("The burden of proof generally lies upon the party asserting or affirming a fact and to the existence of whose case or defense the proof of such fact is essential."); *see also* O.C.G.A. § 24-14-1 (same). The burden of proof includes the burden of persuasion. *Dir., Off. of Workers' Comp. Programs, Dep't of Lab. v. Greenwich Collieries*, 512 U.S. 267, 276 (1994).[7] The burden of persuasion is "the notion that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose." *Id*. at 272. *Greenwich Collieries* surveyed what Congress meant by the "burden of proof" when it passed the federal APA and described the concept as "the obligation which rests on one of the parties to an action to persuade the trier of facts … of the truth of a proposition which he has affirmatively asserted in the pleadings," and "the duty or obligation of establishing, in the mind of the trier of facts, conviction on the ultimate issue." *Id*. at 275 (cleaned up). *See also* 3 William D. Hawkland, *Uniform Commercial Code Series* § 2A-516:11 (Apr. 2024 update) ("Strictly speaking, burden of proof denotes the duty of establishing by a fair preponderance of the evidence the truth of the operative facts upon which the issue at hand is made to turn by substantive law.").

Sandersville also had to satisfy the standard of proof as well. The standard of proof in APA proceedings "is the traditional preponderance-of-the-evidence standard." *Steadman v. SEC*, 450 U.S. 91, 102 (1981). "A preponderance of the evidence is evidence which is more convincing than

[7] This Commission may look to the decisions of the federal courts in defining and applying the burden of proof in administrative proceedings. When federal and state statutory provisions do not contradict or deviate from one another, Georgia courts look to guidance from federal court decisions in interpreting state statutes. *See Stubbs v. Hall,* 308 Ga. 354, 358, 840 S.E.2d 407, 411 (2020) ("In construing a Georgia statute that closely tracks federal statutory law, we may look to federal court decisions and commentary interpreting the federal statute as persuasive authority." (cleaned up)). Here, the Georgia Administrative Procedure Act, O.C.G.A. §§ 50-13-1 *et seq.*, does not contradict or deviate from the federal Administrative Procedure Act as to the burden of proof. *See* 5 U.S.C. § 556(d).

the evidence offered in opposition to it." *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997) (cleaned up). *See also Hayes v. State*, 355 Ga. App. 213, 216, 843 S.E.2d 875, 876-77 (2020) ("preponderance of the evidence" means "that superior weight of evidence upon the issues involved, which, while not enough to free the mind wholly from a reasonable doubt, is yet sufficient to incline a reasonable and impartial mind to one side of the issue rather than to the other. The standard requires only that the finder of fact be inclined by the evidence toward one side or the other.") (cleaned up).

Here, then, Sandersville had to do more than meet Respondents' and NROCC's evidence; it had to beat it and it had to beat it with evidence that was more convincing than that produced by Respondents and NROCC. It did neither of these things. The evidence it produced was both insufficient to overcome the amount of evidence produced by Respondents and NROCC and the quality of the railroad's evidence (unsubstantiated testimony from parties who stand to benefit from the condemnation) was far less convincing than the evidence offered by Respondents and NROCC (testimony and analysis from experts that was essentially unrebutted by the railroad). Yet, the Initial Decision concluded that Sandersville produced evidence of such quality and quantity that it overcame that produced by Respondents and NROCC. This was a reversible error, and this Commission should apply the correct standards and reverse the Initial Decision.

2. Sandersville Did Not Meet Its Burdens Under Georgia Statutes.

To meet its burden under Georgia statute, Sandersville had to show that the taking here is necessary to accommodate Sandersville's business. O.C.G.A. § 46-8-120(a)(4). It also had to show that it complied with Georgia's eminent domain statutes. O.C.G.A. § 46-8-121 and Title 22 of the Georgia Code, including the Landowner's Bill of Rights (2006 Ga. L. Act 444 (H.B. 1313)). Sandersville did neither, yet the Initial Decision holds that it did. This was incorrect.

A. *Sandersville did not meet its burden to show that the Hanson Spur is necessary for the accommodation of its business.*

Sandersville failed to prove a fundamental question in this proceeding, namely, whether it can even construct an operating rail line at all. Sandersville never demonstrated that it could accumulate all the properties necessary to construct an operating railroad. Post-Hr'g Br. Resp'ts 47. Critically, the Initial Decision also minimizes Sandersville's potential need for STB approval—approval which may delay the project indefinitely or may not be forthcoming at all. Post-Hr'g Br. Resp'ts 26, 45-46. This is because the Hanson Spur is not really a spur. It is an entirely new railroad and federal law requires Sandersville to obtain approval from the STB before it can construct and operate the line. 49 U.S.C. § 10901(a)(2). Nonetheless, Sandersville did not address whether it will need to obtain approval from the federal STB before it can operate the Hanson Spur, even though this process could take years to complete and may not be successful. Post-Hr'g Br. Resp'ts 45-46. The possibility of federal intervention here is real, and Sandersville offered no evidence that it has sought the STB's approval or clarified that it is exempt. Rather, Sandersville's way of dealing with the looming federal-approval problem, apparently, is to ignore it and hope for the best. (Tr. 93:15-20 (Mr. Tarbutton answering "I don't know" to whether the project is subject to STB regulation)). Obviously, "I don't know" does not meet the burden here, and this Commission should not be persuaded by it. It is difficult to see how Sandersville has met its standard when it has failed to prove its train can even be built or whether, if built, it can actually travel anywhere.

Had the Hearing Officer correctly applied the applicable standards here, he would have needed to find, by a preponderance of the evidence, that the railroad could actually operate—including whether it could obtain federal approval or explain why Sandersville did not need that approval. He did not, however. Instead, the Initial Decision simply notes that whether Sandersville needs to obtain such approval would hinge on a different legal standard than the issues before the

Commission. Initial Decision 13. That is an irrelevant consideration, however, because the issue is not whether the federal standard for STB approval is different from Georgia's standard for approval of a railroad condemnation, but whether the Hanson Spur is necessary to accommodate Sandersville's business. If Sandersville is unwilling to seek federal approval or unable to meet the federal standard,[8] then it will never build or operate the Hanson Spur and an unfinished rail line that cannot carry any trains is not "necessary" to accommodate anything.

Even if Sandersville could construct the rail line and the federal government permits that line to function, the only evidence that Sandersville put on to show that the Hanson Spur is necessary to the accommodation of Sandersville's business was the testimony of Sandersville's owner, Benjamin Tarbutton, III, who testified that Sandersville is a railroad company, and that the Hanson Spur is necessary for its business. *See* Post-Hr'g Br. Resp'ts 17. The railroad produced nothing but this tautology. It did not produce any expert testimony or objective perspectives in support. It did not even produce any internal studies, much less anything from an objective source. In holding that the condemnation is necessary for the accommodation of Sandersville's business, the Initial Decision accepts that mere assertion, finding that "the 'business of the company' is providing the transportation service of connecting industries by rail and connecting rail traffic with larger rail networks." Initial Decision 13. Yet Sandersville's assertion, and the Initial Decision's acceptance of it, is only to state the obvious: Sandersville is in the business of providing rail

[8] The evidence certainly suggests both that Sandersville must obtain STB approval for this new line and that the railroad may face serious difficulty in obtaining this approval. Sandersville's current operations are regulated by the STB. Post-Hr'g Br. Resp'ts 8. Additionally, a federal court previously enjoined Sandersville from constructing an extension of its main line until it obtained federal approval. *See Gilmore v. Sandersville R.R. Co.*, 149 F. Supp. 725, 726, 729 (M.D. Ga. 1955). Therefore, the probability of federal involvement should be something Sandersville proactively addresses with this Commission, but the Initial Decision makes no such demand. Moreover, a project's business feasibility is one factor toward obtaining or being denied federal approval. *See Eagle County v. STB*, 82 F.4th 1152, 1196 (D.C. Cir. 2023) (vacating STB approval based in part on "uncertain financial viability"). To address the STB question, then, Sandersville would presumably be required to show it has done its due diligence—which Sandersville admits it has not done and seems to not want to do. *See* Post-Hr'g Br. Resp'ts 19 (discussing Mr. Tarbutton's testimony that he has not consulted with any management or financial consultants, nor has he performed any feasibility study, related to the Hanson Spur project).

services. If simply being a railroad company is sufficient for it to condemn, then why would the legislature require it to show anything else? Under Sandersville's and the Initial Decision's rule, O.C.G.A. § 46-8-120(a)(4) becomes meaningless.

In contrast, Respondents proffered considerable, substantive evidence showing that an unviable venture cannot be an accommodation of Sandersville's business. Post-Hr'g Br. Resp'ts 18-28, 46-47. Unfortunately, the Initial Decision again takes Mr. Tarbutton's bare testimony at face value. For instance, on pages 13 and 14 of the Initial Decision, the Hearing Officer states, "A project that is not possible or is doomed to fail may not be a legitimate public use or necessary to accommodate a business. But, that is not the case here. Here the project may or may not earn the return of its sunk capital investment, but it has shown that it is reasonably expected to have cash flow sufficient to continue as an ongoing concern providing rail transportation services." How did the railroad show that, however? The railroad produced no studies of the financial viability of the Hanson Spur, no financial statements of the company, and no expert testimony showing how the project can be financially sustainable overall. In contrast, Respondents' expert, Mr. Hunter, produced a thorough and detailed analysis demonstrating that this project is not financially viable. This is not a question of the evidence being equal—it is a question of unsupported assertions versus actual, substantial evidence and an exhaustive analysis of that evidence. Under the proper burden of proof, Sandersville must lose on this point, not win.

Similarly, the Initial Decision accepts at face value the assertions of the railroad and its putative customers that the Hanson Spur will provide access to new markets for its products. Initial Decision 13. The Initial Decision finds that the Hanson Spur will give access to markets a customer "could not otherwise feasibly reach," and "allow [it] to expand its operation," and also finds that one customer requires "a short line railroad" because otherwise "it could not feasibly provide itself a connection to the CSXT rail system." Initial Decision 7. Again, how do we know any of this?

None of the customers have provided, or even obtained, rate quotes from CSXT; none of the customers, except for the rock quarry, have identified any specific customers to which they intend to sell; CSXT has not provided any direction on the infrastructure, service, equipment, and rates offered on its line, and Sandersville provided no interchange rates with CSXT. All these facts would go to show that the Hanson Spur would get sufficient traffic to make it a viable venture—but Sandersville offered none of these facts.

Sandersville's failure to produce evidence related to CSXT is especially damaging to Sandersville's case given the recent findings of the State of Georgia that Class I rates and service issues are critical to the viability of a short line railroad. Specifically, "[t]he rates and levels of service provided to short line customers depend on the Class I railroads with which they interchange. Short lines could provide excellent service at competitive rates, but if the service connecting railroads is inadequate and rates uncompetitive, the short line services will not be used." SRR Ex. 53 (Georgia State Rail Plan of the Georgia Department of Transportation 2021) at 4-14. Sandersville failed to provide any information to this Commission relating to its dealings with CSXT, and without such information, it cannot prove the long-term viability of this project. It must therefore lose on the question of whether the Hanson Spur will actually provide access to any new markets.

In sum, Sandersville needed to overcome Respondents' and NROCC's evidence with convincing, substantive evidence that this project is necessary to accommodate its business. It did not do this, yet the Initial Decision concluded that it did. Sandersville did not even demonstrate that this project could become fully operational, much less that it is necessary to accommodate the railroad's business. Yet the Initial Decision concluded that the railroad's conclusory statements were sufficient. The Initial Decision erred and this Commission should overturn it.

B. Sandersville did not meet its burden to show that it meets the requirements of Georgia's eminent domain laws.

Under Georgia eminent domain statutes, a condemnor must demonstrate that the proposed condemnation meets the statutory definition of a public use and that is a question on which "the condemnor bears the burden of proof." O.C.G.A. § 22-1-2(a). Sandersville did not demonstrate that it met any of the statutory definitions of "public use" under Georgia's eminent domain laws. Sandersville attempted to argue that the Hanson Spur is a public use because it is a "channel[] of trade" under Georgia's statutory definition of "public use," O.C.G.A. § 22-1-1(9)(A)(iii). This argument appeared for the first time far late in the game—it appears for the first time in Sandersville's rebuttal testimony, after Sandersville had submitted its Initial Petition, Amended Petition, and opening pre-filed testimony, none of which used the term "channels of trade" at all. Post-Hr'g Br. Resp'ts 29 & n.35. Instead, prior to its rebuttal testimony, Sandersville had argued that the Hanson Spur was a public use because it would provide economic development (*see id*. at 28)—something Georgia statutes explicitly state is *not* a public use. O.C.G.A. § 22-1-1(9)(B).

Moreover, even if Sandersville's eleventh-hour realization is true, the railroad's interpretation of the term "channels of trade" was so broad that it would permit any condemnation that permitted goods to travel from one place to another, regardless of whether the beneficiary of the condemnation was a private entity. This illogical reading is inconsistent with the text and history of the statute and would swallow the public use clauses of the U.S. and Georgia Constitutions. Post-Hr'g Br. Resp'ts 49-52. Put another way, Sandersville's definition of "channels of trade" is either wrong or the definition is unconstitutional. Either way, it cannot support Sandersville's proposed condemnation here.

However, the Initial Decision concluded otherwise. It concluded that the Hanson Spur provided a channel of trade because it will give Sandersville's putative customers access to new

markets and "provide a new route for these companies to deliver their goods to market." Initial Decision 16. Besides just saying these things, though, the customers did nothing to demonstrate by a preponderance of the evidence that this was true. They did not produce signed, binding contracts with Sandersville. They did not provide traffic estimates or evidence that they committed to providing any traffic to reach these markets. They did not produce any binding or contingent contracts with CSXT or the ultimate purchasers of their products, or even produce any evidence that CSXT would enter into such contracts with them. Neither Sandersville nor its putative customers offered any objective evidence of the demand for or competitiveness of their products in markets serviced by CSXT. They also did not provide any justification for any traffic numbers they produced.[9]

In sum, the Initial Decision wrongly concludes that the Hanson Spur complies with Georgia's eminent domain laws. The Commission should therefore reverse it.[10]

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[9] The Initial Decision also found that the Hanson Spur is a public use because Georgia law defines "[t]he use of land for the creation or function of public utilities," O.C.G.A. § 22-1-1(10), and Georgia law also defines railroads as "public utilities." O.C.G.A. § 22-1-1(9)(A)(iii). This conclusion ignores the fact that, if all railroads can condemn property because they are public utilities, then all other restrictions on the ability of railroads to condemn private property would be unnecessary. It would also mean that this Commission's decision in the *Great Walton* case, in which this Commission concluded that a proposed condemnation by a railroad was not a public use, was incorrect. Post-Hr'g Br. Resp'ts 41 n.44. In other words, the Initial Decision essentially repeals several Georgia statutes and undoes this Commission's most recent decision regarding condemnations by railroad. This extreme result cannot be the correct result.

[10] Sandersville also failed to demonstrate that it has strictly complied with the statutory requirements for condemnations in Georgia. "Georgia law has always required governments to comply strictly with condemnation procedures when exercising the power of eminent domain[.]" *City of Marietta v. Summerour*, 302 Ga. 645, 659-60, 807 S.E.2d 324, 331-35 (2017). Georgia law requires that a condemning authority make every effort to acquire property by negotiation. O.C.G.A § 22-1-9(1). "In no event shall the condemnor act in bad faith in order to compel an agreement on the price to be paid for the property." O.C.G.A § 22-1-9(7). As evidence of its "good faith" dealings with Respondents, Sandersville only offered the testimony of Mr. Tarbutton and samples of Sandersville's heavy-handed series of letters to Respondents. *See* Tr. 45:3-7 (Tarbutton testimony that Sandersville dealt in "good faith"), Amended Petition Exs. F and G (two letters to Respondent Mr. Garrett); Post-Hr'g Br. Resp'ts 9-12 (describing series of letters and Sandersville's dealings with Respondents). The letters to Respondents showed the opposite of strict compliance or good faith. Sandersville's aggressive tactics included mischaracterizing its powers under Georgia law by suggesting it had authority to condemn before petitioning this Commission (*e.g.,* Tr. 929-30, 1023); ignoring Respondents' refusals to grant access to their properties for surveying, cutting fences and damaging property, when it had only represented to Respondents that it wanted to build the Hanson Spur for the Hanson Quarry, not the public (*e.g.*, Tr. 767:11-21, 897:18-898:1, 859:5-22, 1011:15-1012:2); suggesting it could provide an "administrative review" "just like the state of Georgia does" (*e.g.*, Tr. 929-30); and sending Respondents adhesion-like contracts (*e.g.*, Tr. 1028-

3. Sandersville Did Not Meet Its Burden Under the Georgia or United States Constitutions.

Finally, Sandersville failed to meet or satisfy its burden on whether this proposed condemnation complies with the U.S. and Georgia Constitutions. Unfortunately, the Initial Decision does not engage with the requirements of either. It merely acknowledges that those documents require a taking to be for a public use, Initial Decision 14, then proceeds to rely entirely on Georgia statute to determine what a public use is. *Id*. 14-18. That is not how a public use determination works, however, because Georgia statutes cannot permit a taking forbidden by the U.S. and Georgia Constitutions. Thus, Sandersville needed to prove that its proposed condemnation meets relevant constitutional standards. It did not carry its burden under either constitution, however.

The U.S. and Georgia Constitutions prohibit this Commission from authorizing a private railroad to take land from one person to confer a private benefit on another identifiable private person. *Kelo v. City of New London*, 545 U.S. 469, 477 (2005). Even *Kelo*—which Sandersville heavily relies upon, *see, e.g.*, Post-Hearing Br. Pet'r 30-31 & nn.57 & 59, and which has been widely criticized by commentators, the public, and state legislatures across the country (including by the Georgia legislature, which enacted eminent domain reform directly in response to it, *see* Post-Hr'g Br. Resp'ts 32-34)—only countenanced the taking at issue in that case because the condemnor municipality showed an extensive, detailed plan and the benefits of that plan ostensibly flowed to the public, not identified private parties. *See* Post-Hr'g Br. Resp'ts 35-39 (discussing the facts and reasoning of *Kelo*, and why it does not permit the taking here).

37). Sandersville also offered less than full market value to at least one property owner, Marvin Smith, when it offered one price for acres for the railroad right of way and a different, lower price for acres the railroad would orphan. (Tr. 821:21-822:9, 851:10-25). Respondents offered actual proof of the railroad's bad faith, and that evidence remains entirely unrebutted by Sandersville. Sandersville has the burden of proof, yet the Initial Decision did not address the issue. Sandersville must lose on this statutory requirement, too.

The hearing in this proceeding showed that the only detailed plan Sandersville has made for the Hanson Spur is the route the train will take. *See generally* Tr. 447:7-514:6 (testimony of engineering company contracted to perform land surveying, engineering design, regulatory permitting, and subconsultant coordination for the Hanson Spur). The testimony offered by Sandersville and its putative users did not provide any discussion of a plan designed to benefit the public. Instead, the testimony discussed only private benefits that would accrue to the railroad and its putative customers, not to the public: how the line would allow them to save money, be more competitive, and even act as a hedge against rising prices. *See* Post-Hr'g Br. Resp'ts 13-16; *see also* Tr. 382:14-404:11 (redirect examination of putative users of the Hanson Spur, all affirming that their testimony was in service of their individual, private business interests). Sandersville provided no evidence to demonstrate that anyone beyond these identified private parties would benefit from this taking.

Sandersville also did not show that this taking comports with Georgia courts' constitutional interpretation of the scope of the eminent domain power. Specifically, Sandersville did not show that its proposed condemnation would serve industries, such as electricity, water, gas service, or metal necessary for minting currency, which are sufficiently associated with the public interest to justify a condemnation. *See* Post-Hr'g Br. Resp'ts 40 (citing *Jones v. N. Ga. Elec. Co.*, 125 Ga. 618, 54 S.E. 85 (1906) (listing companies like electric, gas, and water companies, which are associated with the public interest), and *Hand Gold Mining Co. v. Parker*, 59 Ga. 419 (1877) (permitting a condemnation by a private company that provided metal for the minting of currency). Rather, Sandersville put up only the bare testimony of putative users of the Hanson Spur whose business is not related in any way to the public interest. For instance, Georgia case law has recognized for 120 years that a rock quarry like the Hanson Quarry is not a business related to the public interest. *Jones & Co. v. Venable*, 120 Ga. 1, 1, 47 S.E. 549, 550 (1904) ("[T]he enterprise

of quarrying stone and marketing the same is purely private and one in which the public has no interest."). Georgia case law recognizes the same about a business like Southern Chips, LLC. *Garbutt Lumber Co. v. Ga. & Ala. Ry. Co.*, 111 Ga. 714, 715-16, 36 S.E.2d 942, 943 (1900) ("One who owns a sawmill, and is engaged in preparing lumber for market is engaged in a business in which the public is in no way interested, and … is a purely private enterprise.") Likewise, Veal Farms and Pittman produce nothing associated with the public interest. Sandersville and the putative users of the Hanson Spur are not "the public," but are merely specifically identified private parties who will avoid costs by the taking Respondents' property—exactly the people who *cannot* benefit from the use of eminent domain under the federal and state constitutions.

Sandersville simply did not show by a preponderance of the evidence that the Hanson Spur is a public use under the U.S. and Georgia Constitutions. It certainly did not overcome Respondents' and NROCC's evidence that this taking is purely for private interests. Even under the most deferential interpretation of the relevant constitutional standards, something beats nothing, and it certainly beats it under the Georgia Administrative Procedure Act. Because Sandersville did not meet its burden, whether it met statutory standards for a public use does not matter and the Initial Decision erred in concluding otherwise.

4. Conclusion

In administrative proceedings, "when the evidence is evenly balanced, the [petitioner] must lose." *Greenwich Collieries*, 512 U.S. at 281. *See also Ga. Dep't of Educ. v. Niemeier*, 274 Ga. App. 111, 115-16, 616 S.E.2d 861, 864 (2005) (explaining, in a case on appeal from an ALJ to an administrative Board, that "when the evidence is in conflict and the factfinder is in doubt as to where the preponderance of the evidence rested, the doubt should be solved in favor of the party that does not have the burden of proof"). If the evidence here were in balance, Sandersville would lose. However, neither the quantity nor the quality of the evidence here is balanced. Instead, the

evidence is overwhelmingly in favor of the propositions posited by Respondents and NROCC, so Sandersville must certainly lose. This is especially true when the Georgia Supreme Court has repeatedly and consistently warned that, when it comes to condemnations, "all the conditions and limitations provided by law, under which it may be done, should be closely followed. Too much caution in this respect cannot be observed to prevent abuse and oppression." *City of Marietta v. Summerour*, 302 Ga. 645, 659-60, 807 S.E.2d 324, 334-35 (2017) (quoting *Frank v. City of Atlanta*, 72 Ga. 428, 432 (1884)). That is exactly what the Initial Decision did not do.

For every self-serving contention presented by Sandersville, Respondents and NROCC produced substantial evidence to contradict those assertions. Specifically, Respondents and NROCC produced real evidence that overwhelmingly showed that Sandersville's proposed condemnation (i) is a plan supported by woefully insufficient details, (ii) benefits only private interests and specifically identified private individuals and is therefore not a public use, (iii) will not serve the interests of the public and in fact would harm the public, and therefore cannot serve a legitimate public purpose, (iv) is not economically viable, (v) is likely subject to federal regulations that Sandersville has not addressed, (vi) is not necessary to accommodate Sandersville's business, and (vii) does not comply with Georgia's eminent domain statutes. Each reason on its own would support a decision by this Commission denying Sandersville's Amended Petition. Respondents therefore respectfully request that this Commission grant review of the Initial Decision, apply the burden and standard of proof correctly, and deny Sandersville's Amended Petition.

REQUEST FOR ORAL ARGUMENT

Respondents respectfully request oral argument. As discussed above, this case presents novel and complex legal issues, a substantial record, and the interpretation and application of

highly specialized legal terms and technical concepts. Oral argument would greatly benefit the Commission's understanding of the issues presented here.

MOTION FOR STAY

If this Commission does not reject the Initial Decision, Respondents respectfully request that this Commission stay the effective date of any resulting final order until full judicial review of any Commission decision is concluded. Respondents make this request because, should the Commission approve Sandersville's Amended Petition, there is a strong likelihood that Sandersville will seek to initiate condemnation proceedings against Respondents' land as soon as possible.

Under the Georgia Administrative Procedure Act, filing a petition for judicial review "does not itself stay enforcement of the agency decision," but "the agency may grant, or the reviewing court may order, a stay upon appropriate terms for good cause shown." O.C.G.A. § 50-13-19(d)(1). Stays of proceedings to enforce judgments "preserve [the] status quo or the effectiveness of the judgment subsequently to be entered." O.C.G.A. § 9-11-62(e). Before a condemnor may gain title to property, courts must "determine whether the exercise of the power of eminent domain is for a public use and whether the condemning authority has the legal authority to exercise the power of eminent domain," and courts are empowered to "stay other proceedings of the condemnation pending the decision of the court." O.C.G.A. § 22-1-11. The power to grant a stay is one of several provisions of Georgia's Landowner's Bill of Rights and Private Property Protection Act of 2006 designed to "protect property owners from abuse of the power of eminent domain at all stages of the condemnation process." *Summerour*, 302 Ga. at 652.

When Georgia courts consider an application for a stay pending appeal, they "weigh all of the pertinent equities, including the likelihood that the appellant will prevail on the merits of his appeal, the extent to which the applicant will suffer irreparable harm in the absence of a stay or

injunction, the extent to which a stay or injunction would harm the other parties with an interest in the proceedings, and the public interest." *Green Bull Ga. Partners, LLC v. Register*, 301 Ga. 472, 473, 801 S.E.2d 843, 845-46 (2017). Respondents take each factor in turn.

First, even if this Commission were to adopt the Initial Decision, there is good reason to believe that Respondents may ultimately prevail on the merits. This case examines unresolved issues regarding the scope of the Public Use and Public Purpose Clauses of U.S. and Georgia Constitutions, respectively, and how those provisions interact with state statutes granting eminent domain powers to private entities. It also presents issues of first impression regarding the interaction of Georgia's eminent domain laws, and the Landowner's Bill of Rights, with this state's preexisting laws regarding condemnations by private entities. It also presents issues regarding the proper application of the burden and the standard of proof in railroad condemnation proceedings. Given the number and novelty of these issues, Respondents may very likely win on any or all these points. This factor thus weighs in favor of a stay.

Second, Respondent property owners will suffer irreparable harm if this Commission adopts the Initial Decision with no stay in place pending the outcome of an appeal. It is entirely probable—if not likely—that people will move out of their homes and their community to avoid the effect of the Hanson Spur on their lives. Mark and Janet Smith will likely not have community children over at their pond to fish and play, as the train route will be constructed very close to it; the train will also harm their farming, which currently benefits local elderly and a food bank. *See* Post-Hr'g Br. Resp'ts 5 (describing how the Smiths use their property). Don and Sally Garrett will be cut off from half of their property due to the topography of their land,[11] a fact which Sandersville

[11] The Hanson Spur route goes along a gorge on the Garretts' land, and the route will cut off the only access road the Garretts now have. Post-Hr'g Br. Resp'ts 6. Sandersville has not addressed how it plans to allow the Garretts access to their property under these unique circumstances.

has not adequately addressed. The Garretts' son, Don, Jr., who suffers from PTSD, will not realistically be able to stay on his property, at the historic Garrett home house, as the train will be constructed and run just a few hundred feet away. *See* Post-Hr'g Br. Resp'ts 6 (describing how the Garrett family uses their property). Sally Wells and her siblings, nieces, nephews, and grandkids (all of them part of the Garrett family) will gather less at their family property. The Briggs and Reed families will no longer be able to use their properties for rest and hunting. *See* Post-Hr'g Br. Resp'ts 7-8 (describing how the Reeds and Briggses use their properties).

Moreover, the railroad has already entered onto Respondents' land and damaged their property prior to receiving Commission approval. Post-Hr'g Br. Resp'ts 10. Once it receives such approval, it will likely take additional actions that can and will harm Respondents and their property. Once railroad construction begins, Respondents' properties will be dramatically changed for years. Grading the land and stripping it of its trees and vegetation across a 200-foot-wide swath will degrade that land (and its value) for years, if not decades.

The Hanson Spur will not just upend Respondents' lives, but it will rob the NROCC Intervenors of the use and enjoyment of their properties. *See generally* Post-Hr'g Br. Intervenors 5-7 (describing Intervenors and their community). The Hanson Spur will run just yards from many Intervenors' homes, (*see, e.g.*, Tr. 567:4-6 (Test. of Janet Smith), 626:2-20 (Test. of Kenneth Clayton)), which is a fact the Initial Decision did not substantively address. Construction and operation of a train track will make their homes extremely unhealthy, including, for instance, introducing noise pollution, evidence for which was presented at the hearing by Dr. Walker. (*See* Tr. 694:1-754:13). A stay will ensure these irreparable harms will not happen unnecessarily.

In contrast, Sandersville will not suffer harm by this Commission's stay order. Sandersville currently operates a business that is unrelated to the railroad it wants to build across Respondents' properties, and Sandersville's current business will be unaffected as an appeal of this

Commission's decision proceeds. *See* Post-Hr'g Br. Resp'ts 18; (Tr. 45:15-18, 102:10-103:1 (Tarbutton admission that the Hanson Spur is not necessary for the proper accommodation of the Sandersville's *current* business but might only help *expand* its rail service offerings)). Nor will the putative users of the Hanson Spur project suffer harm when a stay is issued. All of Sandersville's putative customers are currently operating without the Hanson Spur. Sandersville's current customers (Veal Farms and Southern Chips) can access CSXT lines by paying the fee to switch from NS to CSX. *See* Post-Hr'g Br. Resp'ts 8. Pittman Construction can continue to hedge its bets by storing liquid asphalt at its Lithonia facility. *Id*. at 14-15. Heidelberg Materials can continue to ship its construction aggregate out of the Hanson Quarry by truck. *Id*. at 13-14. Each representative of each putative user of the Hanson Spur testified that its current interests do not rely upon the construction of the Hanson Spur. *Id.* at 13-16. As of the hearing, moreover, none had even signed any binding (or even contingent) agreements with Sandersville. *Id*. at 24. Nor had they signed any agreements with buyers of their products in the markets the Hanson Spur would purportedly allow them to reach. *Id.* at 13-16. No harm will come to the other parties in this proceeding when this Commission issues its stay.

Finally, a stay will promote the public interest. The public has no interest in allowing an order to take effect that the courts may very well overturn on appeal. In contrast, the public has a significant interest in making sure that before Sandersville takes irreversible action, the Georgia courts have determined with finality whether that action comports with the U.S. and Georgia Constitutions and Georgia statutes. The residents of Hancock County also have an interest in ensuring that they do not unnecessarily suffer the harm to their health, safety, and peace of mind that the Hanson Spur will cause unless and until the courts conclusively conclude that this action meets all legal standards.

If this Commission does not enter a stay, the result will be a duplicative condemnation proceeding, the irreversible destruction of Respondents' and Intervenors' property, health, privacy, and peace of mind, and the unnecessary expenditure of money, resources, and time by Respondents, NROCC, and the railroad. Any actions taken by Sandersville pursuant to a Commission order approving the proposed condemnation that is subsequently overturned on appeal may result in claims for damages by Respondents against Sandersville. No one benefits from such an outcome. Therefore, this Commission should stay any order approving Sandersville's proposed condemnation until all judicial proceedings in this action are concluded.

CONCLUSION

For these reasons, and the reasons set out in Respondents' and NROCC's post-hearing briefs and evidence they submitted before this Commission, Respondents respectfully request that this Commission grant review, reverse the Initial Decision, and dismiss Sandersville's Amended Petition.

Respectfully submitted this 30th day of April 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of April, 2024, a copy of the foregoing *Respondents' Application for Full Commission Review of Hearing Officer's Initial Decision, Request for Oral Argument, and Motion for Stay Of Order* has been served via electronic mail and U.S. First-Class Mail on the following pursuant to GA. COMP. R. & REGS. 515-16-16-.02; 515-2-1-.04(4)(b), (3):

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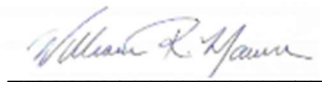
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